No. 11,794

United States Circuit Court of Appeals

For the Ninth Circuit

JOSHUA HENDY CORPORATION, a corporation,

Appellant,

vs.

LOUISE E. MILLS, Administratrix of the Estate of Thomas C. Mills, deceased,

Appellee.

Brief of the Waterfront Employers Association of the Pacific Coast and the San Francisco Employers' Council as Amici Curiae

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STATUTES

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SCOPE OF THIS BRIEF

This brief is filed pursuant to leave of Court for the exclusive purpose of discussing the constitutionality, as applied to a claim arising prior to its enactment, of Section 2 of the Portal-to-Portal Act, which provides in substance that no employer shall be subject to any liability under the Fair Labor Standards Act on account of any

activity of an employee, excepting activities which were compensable by contract or custom. We do not propose to discuss the question whether the activities in which plaintiff engaged were of a kind which are compensable under the Act; we assume for the purpose of the argument that they were not, and that plaintiff is here asserting a claim to a windfall payment of which he had no expectation founded in either contract or custom at the time of performance of the services for which the payment is claimed. In short, the argument which follows assumes that the plaintiff's claim is one of the type upon which Section 2 of the Act, if constitutional, precludes recovery.

SUMMARY OF ARGUMENT

The Courts, without exception, have held Section 2 of the Act to be constitutional. The Act does not attempt to abridge common law or non-statutory rights, but is a declaration by Congress that it never intended to confer statutory rights such as here asserted. Congress can deprive the District Courts of jurisdiction to relief predicated upon such alleged statutory rights. It also can abrogate the alleged rights themselves, because a right founded solely in statute may be repealed by statute and because the Commerce Clause empowers Congress to abrogate private rights in the national interest.

ARGUMENT

I. The Courts Have Held Without Exception That Section 2 of the Act Is Constitutional.

Since the effective date of the Act (May 14, 1947) innumerable Portal-to-Portal actions based on claims arising prior thereto have been dismissed by reason of the provi-

sions of the Act. Cited in the margin are 60 such decisions from one Circuit Court of Appeals[1] and from 32 different United States District Courts.[2] In every one of

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[1]*Seese v. Bethlehem Steel Co.* (C.CA. 4th) 14 L.C. 64,515, 7 W.H. Cases 989.

[2]*Alameda v. Paraffine Companies, Inc.* (N.D. Cal.) 13 L.C. 64, 158; *Cardinale v. General Motors Corp.* (S.D. Cal.) 76 F. Supp. 742; *Devine v. Joshua Hendy Corp.* (S.D. Cal.) 14 L.C. 64,496; *Felton v. Latchford Marble Glass Co.* (S.D. Cal.) 14 L.C. 64,548; *Kirkham v. Pacific Gas & Electric Co.* (N.D. Cal.) 13 L.C. 64,199; *Quinn v. California Shipbuilding Corp.* (S.D. Cal.) 76 F. Supp. 742; *Local 626 UAW v. General Motors Corp.* (D.C. Conn.) 76 F. Supp. 593; *Moeller v. Atlas Powder Co.* (D.C. Conn.) 7 W.H. Cases 395; *May v. General Motors Corp.* (N.D. Ga.) 73 F. Supp. 878; *Hollingsworth v. Federal Mining & Smelting Co.* (D.C. Idaho) 74 F. Supp. 1009; *Bauler v. Pressed Steel Car Co., Inc.* (N.D. Ill.) 14 L.C. 64,569; *Smith v. American Can Co.* (E.D. Ill.) 8 F.R.D. 112; *Hornbeck v. Dain Mfg. Co.* (S.D. Ia.) 7 F.R.D. 605; *Elting v. North American Aviation Inc. of Kansas* (D.C. Kan.) 13 L.C. 64,154; *Moeller v. Eastern Gas & Fuel Associates* (D.C. Mass.) 74 F. Supp. 937; *Sherman v. Bethlehem Steel Co.* (D.C. Mass.) 14 L.C. 64,524; *Bateman v. Ford Motor Co.* (E.D. Mich.) 76 F. Supp. 179; *Boerkoel v. Hayes Mfg. Corp.* (W.D. Mich.) 14 L.C. 64,414; *De Maio v. Grant Storage Battery Co.* (D.C. Minn.) 14 L.C. 64,285; *Plummer v. Minneapolis-Moline Power Implement Co.* (D.C. Minn.) 76 F. Supp. 745; *Bumpus v. Remington Arms Co.* (W.D. Mo.) 74 F. Supp. 788; *Hays v. Hercules Powder Co.* (W.D. Mo.) 7 F.R.D. 599; *Horner v. McQuay Norris Mfg. Co.* (E.D. Mo.) 13 L.C. 64,087; *Johnson v. Park City Consol. Mines Co.* (E.D. Mo.) 73 F. Supp. 852; *Lockwood v. Hercules Powder Co.* (W.D. Mo.) 14 L.C. 64, 366; *Sadler v. W. S. Dickey Clay Mfg. Co.* (W.D. Mo.) 73 F. Supp. 690; *Tucker v. Pratt & Whitney Aircraft Corp.* (W.D. Mo.) 7 W.H. Cases 839; *Role v. J. Neils Lumber Co.* (D.C. Mont.) 74 F. Supp. 812; *McComb v. Swanson & Sons* (D.C. Neb.) 14 L.C. 64,541; *Grazeski v. Federal Shipbuilding & Dry Dock Co.* (D.C. N.J.) 14 L.C. 64,468; *Abernathy v. General Motors Corp.* (S.D. N.Y.) 14 L.C. 64,525; *Bartels v. Sperti, Inc.* (S.D. N.Y.) 73 F. Supp. 751; *Bonner v. Elizabeth Arden, Inc.* (S.D. N.Y.) 13 L.C 64,147; *Borucki v Continental Baking Co.* (S.D. N.Y.) 74 F. Supp. 815; *Darr et al. v. Mutual Life Ins. Co. of New York* (S.D. N.Y.) 72 F. Supp. 752; *Donovan v. Republic Steel Corp.* (W.D. N.Y.) 14 L.C. 64,295; *Holland v. General Motors Corp.* (W.D. N.Y.) 75 F. Supp. 274; *Lemme v. Caruso Foods, Inc.* (S.D. N.Y.) 14 L.C. 64,391; *Markert v. Swift & Co.* (S.D. N.Y.) 13 L.C. 64,146; *Mauro v. Slaughter & Co.* (S.D. N.Y.) 14 L.C. 64,299; *Murphy v. Ford Motor Co.* (N.D. N.Y.) 14 L.C. 64,538; *Shaievitz v. Laks* (S.D. N.Y.) 14 L.C. 64,509;

these cases the constitutionality of Section 2 of the Act has been sustained. Furthermore, this Court itself has passed upon the same constitutional question in upholding Section 11 of the Act,[3] as have also the courts of the Sixth and Eighth Circuits, in upholding Sections 9 and 11.[4]

We have found no case in which Section 2 has been held unconstitutional.

II. The Act Does Not Involve an Attempt by Congress to Abridge Common Law or Non-Statutory Rights; It Is a Declaration by Congress That Congress Never Intended to Confer a Statutory Right Such as Here Asserted.

Reference to the background against which the Portal-to-Portal Act was enacted, and to the nature of the claims at which it was directed, is necessary to place the arguments regarding constitutionality in their proper setting.

Sinclair v. United States Gypsum Co. (W.D. N.Y.) 75 F. Supp. 439; *Sochulak v. American Brake Shoe Co.* (S.D. N.Y.) 7 W.H. Cases 584; *Fajack v. Cleveland Graphite Bronze Co.* (N.D. Ohio) 73 F. Supp. 308; *Hassel v. Standard Oil Co.* (N.D. Ohio) 8 WH Cases 41; *Smith v. Cleveland Pneumatic Tool Co.* (N.D. Ohio) 14 L.C. 64,462; *Adkins v. E. I. duPont de Nemours & Co.* (N.D. Okla.) 13 L.C. 64,025; *McDaniel v. Brown & Root, Inc.* (E.D. Okla.) 14 L.C. 64,511; *Boehle v. Electro Metallurgical Co.* (D.C. Ore.) 72 F. Supp. 21; *Battery Workers Union v. Electric Storage Battery Co.* (E.D. Penn.) 14 L.C. 64,298; *Hart v. Aluminum Co. of America* (W.D. Pa.) 73 F. Supp. 727; *Lasater v. Hercules Powder Co.* (E.D. Tenn.) 73 F. Supp. 264; *Burfeind v. Eagle-Picher Co.* (N.D. Tex.) 71 F. Supp. 929; *Story et al. v. Todd Houston Shipbuilding Corp.* (S.D. Tex.) 72 F. Supp. 690; *Cochran et al. v. St. Paul & Tacoma Lumber Co.* (W.D. Wash.) 73 F. Supp. 288; *Miller v. Howe Sound Min. Co.* (E.D. Wash.) 77 F. Supp. 541; *Ackerman v. J. I. Case Co.* (E.D. Wis.) 74 F. Supp. 639.

[3] *Southern California Freight Lines v. Davis*, 167 F.2d 708.

[4] *Rogers Cartage Co. v. Reynolds* (C.C.A. 6th) 166 F.2d 317; *Day & Zimmermann, Inc. v. Reid* (C.C.A. 8th) 14 L.C. 64,545, 7 W.H. Cases 1040.

As already stated, we assume the present case to be a "portal-to-portal" case, i.e., a suit to recover compensation for alleged services which the parties did not consider to be compensable "work" at the time of their performance. This being its nature, the suit is based on a construction of the *Fair Labor Standards Act* by the Supreme Court in the *Mt. Clemens Pottery* case that came as a surprise to the country.

That decision held that certain time must be compensated, solely because of a judicial construction of the meaning of the term "work" and *"regardless of contrary custom or contract"* (328 U.S. at 692). This construction met with violent disagreement from a large segment of the Supreme Court itself. Mr. Justice Burton and Mr. Justice Frankfurter dissented (cf. 328 U.S. at p. 697); Mr. Justice Jackson was in Nuernberg at the time but after his return took occasion, in *Walling v. Portland Terminal Co.*, 330 U.S. 148, 154, to express his complete disapproval of the *Mt. Clemens* doctrine.

The effect of the *Mt. Clemens* decision was monstrous and electrifying. After long deliberation Congress enacted the *Portal-to-Portal Act* to establish as law what, according to the three dissenting judges, always had been the law and what Congress itself believed always had been the law.

The *Portal-to-Portal Act* prohibits any recoveries except for activities which were compensable as work by (1) *express* contract or (2) custom. *And Congress expressly made this rule applicable to suits already instituted as well as future actions.* It did so because it felt that the *Mt. Clemens* decision was a perversion of the legislative intent.

The effect of the *Mt. Clemens* decision and the conclusions of Congress concerning the needs of the public welfare in the shocking situation then confronting the country are clearly stated in Section 1 of the *Portal-to-Portal Act.* There Congress states its policy and its findings. As Mr. Justice Holmes said in *Block v. Hirsch,* 256 U.S. 135 at 154, such findings by Congress declared in its statutes are entitled to the highest respect of the courts. What is more, to borrow the language of Mr. Justice Holmes in *Block v. Hirsch,* Congress was here but stating "a publicly notorious * * * fact."

We quote these findings (Title 29 *U.S.C.,* Sec. 251):

> "SEC. 251. CONGRESSIONAL FINDINGS AND DECLARATION OF POLICY.
>
> "(a) The Congress finds that the Fair Labor Standards Act of 1938, as amended, *has been interpreted judicially in disregard of long-established customs, practices, and contracts* between employers and employees, thereby *creating wholly unexpected liabilities, immense in amount and retroactive in operation,* upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about *financial ruin* of many employers and seriously impair the capital resources of many others, thereby resulting in the *reduction of industrial operations,* halting of expansion and development, *curtailing employment, and the earning power of employees;* (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross in-

equality of competitive conditions between employers and between industries; (4) *employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay;* (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) *the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged;* (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

"The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

"The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted. * * *

> "(b) It is declared to be the policy of the Congress in order to meet the existing emergency *and to correct existing evils* (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts."

The decision of the Supreme Court in the *Mt. Clemens* case *retroactively* created liabilities running into billions. By a new decision, repudiating *Mt. Clemens*, it could end all such claims, just as it created them. Yet plaintiff makes the monstrous contention that Congress is helpless to withdraw from the courts created by it jurisdiction to enforce these retroactively created liabilities and that the nation must, in the language of Mr. Justice Jackson, lie in a legal strait jacket of the Court's own design, from which there could be no possible escape.

The *Portal-to-Portal Act* does not involve an attempt by Congress to abridge common law or non-statutory rights. It is a declaration by Congress that it did not intend to confer certain statutory rights, that if, under judicial construction, a statute of Congress conferred such rights, then that which Congress had by statute created it by statute would revoke.

In the face of the notorious facts recited in Section 1 of the Act, plaintiff cannot rationally talk in terms of vested rights or impairment of contracts. No consensual element is involved in the plaintiff's claim. He seeks to realize a pure windfall.

The *Portal-to-Portal Act* seeks to prevent the realization of such a windfall in two ways: (1) it divests the

District Courts of jurisdiction to proceed; (2) it abrogates the right of plaintiff to recover on the merits. The Act contains the usual separability clause, and, if either of these provisions is constitutional, the action must fail. In fact, the Act is constitutional in both respects.

III. The Act Operates Constitutionally to Deprive the District Courts of Jurisdiction.

The constitutionality of the provisions depriving the District Courts of jurisdiction is so clear that many courts have rested their dismissals on those provisions alone. See e.g., *Alameda v. The Paraffine Companies* (N.D. Cal.), 13 L.C. 64,158; *Johnson v. Park City Consolidated Mines Co.* (E.D. Mo.), 73 F. Supp. 852; *Quinn v. California Shipbuilding Corp.* (S.D. Cal.), 7 W.H. 310.

IV. The Act Operates Constitutionally to Deprive the Plaintiff of His Claim for Relief.

The provisions of the Act terminating pending cases on the merits are likewise constitutional.

Plaintiff's argument is, in essence, that the Act is unconstitutional because it has a retroactive effect,—a sardonic condemnation of an act the very purpose of which is to eliminate the baneful retroactive effect of the *Mt. Clemens* decision.

As the courts have repeatedly said, a statute is not unconstitutional merely because it has a retroactive operation. E.g., *United States v. Pownall,* 65 F. Supp. 147, 150 ("The Constitution of the United States does not forbid making a federal civil statute operate retroactively."—Yankwich, J.); *Blount v. Windley,* 95 U.S. 173,

180 ("* * * there is no constitution inhibition against retrospective laws. Though generally distrusted, they are often beneficial, and sometimes necessary").

Plaintiff refers to his claim as "vested" and contends that the Act violates the due process clause of the Fifth Amendment. But to term his claim "vested" merely begs the question. A vested right is one "of which the individual cannot be deprived arbitrarily without injustice." *American States etc. Co. v. Johnson*, 31 C.A. 2d 606, 614; *Nebbia v. New York*, 291 U.S. 502. The cancellation of a windfall is not an arbitrary deprivation that operates unjustly. As said in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 at p. 316, when no course of action has been undertaken on the assumption that a certain rule of law exists, cancellation of that rule is not a deprivation of property without due process. In *United States v. Heinszen & Co.*, 206 U.S. 370, before ratification of the treaty of peace with Spain tariff duties were imposed and collected on imports into the Philippines by order of the President of the United States. Thereafter the Supreme Court held that the President had no such power, and that those who had paid had the right to recover. Subsequently, Heinszen sued to recover certain payments. While the action was pending Congress passed legislation ratifying the tariff *ab initio*. The trial court gave judgment for plaintiffs, holding that the Act violated the Fifth Amendment. The Supreme Court reversed and held that it did not do so.

A. WHERE A RIGHT HAS BEEN CREATED SOLELY BY STATUTE, IT MAY BE REPEALED BY STATUTE IF NOT YET REDUCED TO JUDGMENT.

The fundamental vice of plaintiff's argument is that it ignores the fact that his right in this case to recover anything at all was *solely and purely* statutory, the creature of Congress.

It is a fundamental rule that, where a right is created solely by statute, the authority that enacted the statute may repeal it and may abridge the right as if it never existed, if not yet reduced to judgment. *Ex parte McCardle,* 74 U.S. 506. All the portal-to-portal decisions note this element.

Mr. Justice Henshaw's opinion in *People v. Bank of San Luis Obispo,* 159 Cal. 65, discusses the subject at length and completely supports the constitutionality of the *Portal-to-Portal Act. Moss v. Smith,* 171 Cal. 777 (opinion also by Judge Henshaw) lays down the same rule.

If the Fair Labor Standards Act—that is to say, the construction which the Supreme Court saw fit to place upon it after the alleged "services" had been performed —entered into and became part of plaintiff's contract of employment, *there also entered into the contract as one of its terms the power of Congress to repeal any statutory rights created by the Fair Labor Standards Act.*

In *Gelfert v. National City Bank,* 313 U.S. 221, the court said (p. 231):

> "As this Court said in *Home Building & Loan Assn. v. Blaisdell,* 290 U.S. 398, 435, 'Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order.' And see

> *Voeller v. Neilston Warehouse Co.*, 311 U.S. 531. It is that reserved legislative power with which we are here concerned."

And cf. *United States v. Heinszen & Co.*, 206 U.S. 370 and *East New York Bank v. Hahn*, 326 U.S. 230.

In the *Gelfert* case, which related to state legislation, the power to repeal and change was found in the essential attributes of sovereign power. In the case of Congress, there is something more, for Title 1 *U.S.C.*, Sec. 29, provides that "the repeal of any statute shall not have the effect to release or extinguish any * * * liability incurred under such statute unless the repealing Act shall so expressly provide." In other words, if it is so provided, the statutory liability shall be extinguished. The *Portal-to-Portal Act* does, of course, expressly provide that there shall be no liability even in pending actions. Now Section 29 has been on the statute books since long before the Fair Labor Standards Act. If the latter entered into contracts of employment as one of its terms, the provisions of Section 29 also entered into the contract and conferred on Congress the power to revoke any rights conferred by the Fair Labor Standards Act.

The foregoing rules are particularly applicable here. The rights conferred by the Fair Labor Standards Act on individuals were created not so much for the benefit of the individual as for the sake of the public. The very cases cited in plaintiff's memorandum point to the double character of the right and emphasize its double aspect. See e.g., *Overnight Motor Co. v. Missel*, 316 U.S. 572, 576, 577. It is for this reason that the Supreme Court has held that employees cannot waive their rights or give re-

leases. *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 704, 709; *Schulte v. Gangi,* 328 U.S. 108.

The rule that upon repeal of a statute all rights not yet reduced to judgment fall without violation of any constitutional right is particularly applicable where the repealed right was created for the interest of the public. *Ewell v. Daggs,* 108 U.S. 143, 151. If, as said in the *O'Neil* case, supra, at p. 704, "Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate," then such a private right does not become constitutionally immune from revocation where its enforcement would thwart that legislative policy or one deemed paramount.

Plaintiff cites a number of cases, but those very cases are reviewed and held not to be in point in *Seese v. Bethlehem Steel Co.,* (C.C.A. 4th) 7 W.H. Cases 989, 14 L.C. 64,515, as well as in many other decisions cited by us. A consideration of one, *Coombes v. Getz,* 285 U.S. 434, suffices to answer all of them. That case involved directors' liability, created by the State Constitution, to creditors for money embezzled by corporate officers. While the action was pending the constitutional provision was repealed. The court held that the repeal could not affect the right of the creditors because the right was not *purely* statutory. The creditors had extended credit to the corporation in reliance on the constitutional provision and had incurred actual loss. The court distinguished other cases on the ground that in them "No element of contract was present." But such is the situation here,

for no element of contract was present. Here plaintiff did not suppose that what he now seeks compensation for was work or something for which compensation was due. Not until the *Mt. Clemens* case was that idea born in the fertile brain of legal counsel for one of the great unions. As stated in Section 1 of the *Portal-to-Portal Act* (29 *U.S.C.,* Sec. 251), recoveries in portal-to-portal cases would constitute a sheer *windfall.* The present case falls within the reasoning of the Supreme Court in *Morely v. Lake Shore etc. Railway Co.,* 146 U.S. 162, where it was held that a judgment obtained before the passage of an act which reduced the rate of interest on judgments was not protected by the Constitution. The court said (p. 169):

> "It is contended on behalf of the plaintiff in error, as stated above, that the judgment is itself a contract, and includes within the scope of its obligation the duty to pay interest thereon. As we have seen, it is doubtless the duty of the defendant to pay the interest that shall accrue on the judgment, if such interest be prescribed by statute, *but such duty is created by the statute, and not by the agreement of the parties,* and the judgment is not itself a contract within the meaning of the constitutional provision invoked by the plaintiff in error. *The most important elements of a contract are wanting.* There is no *aggregatio mentium. The defendant has not voluntarily assented or promised to pay.*"

We also note that in *Coombes v. Getz,* Judges Cardozo, Brandeis and Stone dissented on the ground that the "liability by the law of its creation was defeasible in its origin." This is clearly true in the case of federal statutes in view of the existence of *Title I, U.S.C.,* Section 29.

B. APART FROM THE FACT THAT THE REPEALED RIGHTS WERE WHOLLY STATUTORY, THE ACT IS CONSTITUTIONAL AS A LEGITIMATE EXERCISE OF THE COMMERCE POWER.

The decision in the *gold clause* cases, *Norman v. Baltimore & Ohio Railroad Co.*, 294 U.S. 240, is a complete answer to plaintiff. It establishes (pp. 309, 310) *"the power of the Congress to invalidate the provisions of existing contracts which interfere with the exercise of its constitutional authority."*

> "The principle is not limited to the incidental effect of the exercise by the Congress of its constitutional authority. There is no constitutional ground for denying to the Congress the power expressly to prohibit and invalidate contracts although previously made, and valid when made, when they interfere with the carrying out of the policy it is free to adopt."

The *Portal-to-Portal Act* was enacted in the exercise of the commerce power to protect interstate commerce from grave evils, and it so declares in the Congressional declaration of Findings and Policy which will be found in Section 1 (29 *U.S.C.*, Sec. 251). Congress declared that there was an existing emergency, that it was necessary to relieve commerce from the obstruction and burdens then clogging it, and Congress concluded that "it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect and foster commerce, that this act be enacted." The President of the United States expressed agreement with these Findings when he approved the statute.

The *Portal-to-Portal Act* was not designed to regulate this or that contract between private individuals but to

protect the public from what Congress thought would be calamity.

As said by the Circuit Court of Appeals for the Ninth Circuit in *P. G. & E. Company v. Sacramento Municipal Utility District,* 92 F.2d 365 at 370, in determining the constitutionality of a state or federal law the court must consider as existing every rationally conceivable state of facts which would justify the enactment of the law and which may be attributed to the deliberation, belief and purpose of the legislature in its enactment.

In *East New York Bank v. Hahn,* 326 U.S. 230, the court considered the power of the legislature to enact legislation which might frustrate and invalidate private contracts. It notes that such power had been upheld in numerous cases of recent years and it deduced (p. 232)

> "this governing constitutional principle: when a widely diffused public interest has become enmeshed in a network of multitudinous private arrangements, the authority of the State 'to safeguard the vital interests of its people,' 290 *U.S.* at 434, is not to be gainsaid by abstracting one such arrangement from its public context and treating it as though it were an isolated private contract constitutionally immune from impairment.
>
> "The formal mode of reasoning by means of which this 'protective power of the State,' 290 *U.S.* at 440, is acknowledged is of little moment. It may be treated as an implied condition of every contract and, as such, as much part of the contract as though it were written into it, whereby the State's exercise of its power enforces, and does not impair, a contract."

In the *gold clause* cases, the parties had in fact made contracts, which Congress constitutionally abrogated. Here

they made no contracts for the payment of portal-to-portal pay. Plaintiff merely argues that the previous statute became part of the contract of employment. Since Congress can constitutionally abrogate express contracts, it certainly may abrogate a so-called implied contract where the implication arises solely from the existence of a previous—but now repealed—statute of Congress.

When the Fair Labor Standards Act was passed, it was held to apply to employment contracts *theretofore existing,* over the objection that by increasing the agreed rate of payment it was impairing the obligation of the contract. The court said:

> "If overtime pay may have this effect upon commerce, private contracts made before or after the passage of legislation regulating overtime cannot take the overtime transaction 'from the reach of dominant constitutional power.' *Norman v. B. & O. R. Co.,* 294 U.S. 240, 306-311. If, in the judgment of Congress, time and a half for overtime has a substantial effect on these conditions, it lies with Congress' power to use it to promote the employees' well-being." *Overnight Motor Co. v. Missel,* 316 U.S. 572 at 577.

What was true of the very statute upon which plaintiff bases his rights is equally true of the statute which has put an end to them.

CONCLUSION

We respectfully submit that Section 2 of the *Portal-to-Portal Act* is constitutional.

Dated, San Francisco, California
July 12, 1948.

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